ADMISSIBILITY OF DECLARATIONS OF THE INSURED AGAINST THE BENEFICIARY.

So far as the rules of evidence are concerned the admissibility, in a suit by a beneficiary, of the declarations of the insured is not difficult to determine.

If the issue is whether the insured knew he had had a certain disease which in his application he stated he had not had, his declarations are admissible if made sufficiently near the time of making the application not to be too slightly probative. This is the result of the general exception to the hearsay rule which lets in under some circumstances declarations of persons to show their intentions or state of knowledge.[1] There is, however, this important restriction on its admissibility for this purpose: It is necessary that a foundation for it be laid by the introduction of evidence apart from the declarations of the insured, that the insured actually had the disease in question.[2]

As evidence that the insured actually had the disease to which the declarations referred, his statement is clearly objectionable on the ground that it is hearsay. It is true that if the question is whether the insured had a disease or was in bad health at a particular time—say at the time the application was made—the declarations made by him at that time might have been admissible as part of the *res gestæ*.[3] This, Professor Wigmore has pointed out, is a new and indefensible exception to the hearsay

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[1] Towne *v.* Towne (1901) 191 Ill., 478 (insured's conduct and declarations admitted, on the issue of his knowledge of the contents of a certificate held by him). See also the cases where the issue is as to the insured's intent to defraud. These declarations are admissible in the same way to show his intent. Smith *v.* N. B. Society (1900) 123 N. Y., 85; Conn. Mut. Life *v.* Hillmon (1902) 188 U. S., 208; Ins. Co. *v.* Morris (1879) 3 Lea. (Tenn.) 101, 103.

[2] McGowan *v.* I. O. O. F. (1899) 104 Wis. 173, at 184 (declarations by insured made prior to application as to fact of disease, excluded except to show knowledge of fact that he had such disease and then only when other evidence of the existence of the disease had been offered); Dilleber *v.* Home Life Ins. Co. (1877) 69 N. Y. 256 (same); Edington *v.* Mutual Life Ins. Co. (1876) 67 N. Y. 185 (same); Swift *v.* Mass. Mut. Life (1875) 63 N. Y. 186, is supported on this precise ground, and the opinion of the court so places it, though not so clearly as in the later New York cases above cited.

[3] Kelsey *v.* Universal Life Ins. Co. (1868) 35 Conn. 225, 236; Aveson *v.* Kinnaird (1805) 6 East. 188; Swift *v.* Mass. Mut. Life Co. (1875) 63 N. Y. 186 (semble); Sutcliffe *v.* Traveling Men's Assn. (1903) 119 Ia. 220, 223.

exception.[1] Nevertheless, conceding it to exist, the declarations which have reference only to diseases which the insured had had at a time in the past, cannot of course be let in under it.[2]

The point about which there is any difficulty is whether or how far the declarations of the insured not admissible as part of the *res gestæ* may be let in to prove the fact of the insured's having had the diseases declared about on the ground that they are admissions which bind the beneficiary suing. The writer of the treatise on the law of insurance contracts is apt to slight this question on the ground that it properly belongs to a work on evidence. The writer on the law of evidence with much plausibility may say that the declarations should be let in as admissions against the beneficiary, provided the beneficiary takes an interest in the contract of insurance under or from the insured and that that is a question of the substantive law of contracts involving the nature of the rights of the beneficiary with which the law of evidence has nothing to do.[3] This process of mutual exclusion furnishes, it is believed, an excuse for the following exposition.

Concerning the admissibility of the insured's declarations as admissions of the fact declared about, the general results of the cases may thus be stated:

If the declaration is made *before* the date of the policy and application, then the cases without exception or qualification hold it not receivable. It makes no difference whether the beneficiary's interest is vested, *i. e.*, not subject to change by the insured or upon any other event,[4] or contingent, *i. e.*, subject to

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[1] 3 Wigmore on Evidence §1796.

[2] Valley Mutual Life Ins. Co. *v.* Burke 12 Ins. Law J. 337, 342, and Fraternal Mutual Life Ins. Co. *v.* Applegate (1857) 7 Oh. St. 292, 297: "They were not the declarations of a sick person in relation to his condition at the time of making them, but related to transactions and a state of facts long past."

Terwilliger *v.* Royal Arcanum (1888) 49 Hun. (N. Y.) 305, 306: "The evidence (made prior to the policy by the insured) excluded related to declarations unattended by any act or fact, and was, therefore, inadmissible."

Rawson *v.* Milwaukee Mut. Life Co. (1902) 115 Wis. 641: Here the statement by the insured three years before the policy in question that five years before the date of the declaration he had had a certain disease was not admissible as part of the *res gestæ*.

Union Central Ins. Co. *v.* Cheever (1880) 36 Oh. St. 201, 207 (same).

[3] 2 Wigmore on Evidence §1081.

[4] Yore *v.* Booth (1895) 110 Calif. 238; Fraternal Mutual Life Ins. Co. *v.* Applegate (1857) 7 Oh. St. 292, 297.

change by the insured or by any other event specified.[1] In most of the cases the declarations are excluded without any reference to whether the beneficiary's interest is vested or contingent, and it is in fact impossible to tell which situation existed from anything that appears in the reports.[2] In two cases the same rule applied, although the insured took a policy in his own name and assigned it to the plaintiff.[3]

If the declaration is made *after* the date of the policy, then (a) If the beneficiary takes a vested interest—one not subject to change by the insured or by any other event specified—the cases without exception hold the declarations not receivable as an admission.[4] (b) If there is a right to change the beneficiary or if the beneficiary's interest is otherwise contingent, then the authorities are divided—three holding that the declarations are receivable as admissions[5] and two *contra.* (c) In a large number of cases, however, where the declarations were excluded it does not appear whether the beneficiary had a vested or contingent interest and the decisions of the courts are made without the slightest reference to that question.[7]

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[1] Rawson *v.* Milwaukee Mutual Life Ins. Co. (1902) 115 Wis. 641 (here the insured had full power to change beneficiaries); Dilleber *v.* Home Life Ins. Co. (1877) 69 N. Y. 256 (here the policy was payable to the insured if he was alive at a certain date, or if not, to his wife); Evers *v.* Life Assn. of America (1875) 59 Mo. 429, 432 (policy was payable to the insured if he was alive at a certain date and if not then to B. It was not clear, however, whether the declarations were made before or after the policy issued).

[2] Union Central Life Ins. Co. *v.* Cheever (1880) 36 Oh. St. 201, 209; Mutual Life Ins. Co. *v.* Selby (1896) 72 Fed. 980, 982; Schwarzbach *v.* Ohio Valley Prot. Union (1885) 25 W. Va. 622, 646; Supreme Lodge *v.* Wollschlager (1896) 22 Colo. 213; Terwilliger *v.* Royal Arcanum (1888) 49 Hun. (N. Y.) 305; Valley Mutual Life Assn. *v.* Teewalt (1884) 79 Va. 421.

Aveson *v.* Kinnaird (1805) 6 East 188, and Kelsey *v.* Universal Ins. Co. (1868) 35 Conn. 225, so far as they appear to be *contra* to the above have been discountenanced. See Fraternal Life Ins. Co. *v.* Applegate (1857) 7 Oh. St. 292, at 298, and Supreme Lodge *v.* Wollschlager (1896) 22 Colo. 213.

[3] Edington *v.* Mutual Life Ins. Co. (1876) 67 N. Y. 185; Hale *v.* Life Indemnity Co. (1896) 65 Minn. 548.

[4] Ins. Co. *v.* Morris (1879) 3 Lea (Tenn.) 101; Southern Life Ins. Co. *v.* Booker (1872) 9 Heisk. (Tenn.) 606, 619; Valley Mutual Life Ins. Co. *v.* Burke, 12 Ins. Law Jour., 337 (Supreme Court of Appeals of Va.).

[5] Life Association *v.* Winn (1896) 96 Tenn. 224; Thomas *v.* Grand Lodge (1895) 12 Wash. 500; Steinhausen *v.* Mutual Accident Assn. (1891) 59 Hun. (N. Y.) 336.

[6] Supreme Lodge *v.* Schmidt (1884) 98 Ind. 374, 379; Evers *v.* Life Assn. of America (1875) 59 Mo. 429, 432 (it is not absolutely clear whether the declarations here were made before or after the issuance of the policy).

[7] Washington Life Ins. Co. *v.* Haney (1872) 10 Kan. 525, 535; McGinley *v.* U. S. Life Ins. Co. (1878) 8 Daly (N. Y.), 390, 392; Mulliner *v.*

The solution on principle of the problems presented in the above results is, it is submitted, as follows:

Where the declaration is made *before* the policy issued it is particularly easy to sustain the result of the cases. The only possible ground upon which the declaration of the insured could be receivable as an admission would be that the beneficiary took title to the obligation of the insurance company from or under the insured. In such cases the identity of interest between the insured and the beneficiary is as to the title to the obligation running from the insurance company and contained in the policy. There is, therefore, this fatal objection to receiving such declarations as admissions against the beneficiary: They were made before the insured obtained any title to the obligation which the beneficiary is supposed to have taken from or under him. The rule is clear that under these circumstances the declarations cannot be used against the successor in title.[1] It is clear also that this principle applies to prevent the insured's declarations made long before the application and policy being admissible against the beneficiary as admissions.[2]

Edington v. Mutual Life Ins. Co., (1876) 67 N. Y., 185, and *Hale* v. *Life Indemnity Co.*, (1896) 65 Minn. 548. In both of

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Guardian Mutual Life Ins. Co., (1873) 1 Thompson & C. (N. Y.), 448, 450; Lazensky *v.* Supreme Lodge (1887) 31 Fed. 592, 595; Valley Mutual Life Assn. *v.* Teewalt (1884) 79 Va. 421; Sutcliffe *v.* Traveling Men's Assn. (1903) 119 Ia. 220, 223; Schwarzbach *v.* Ohio Valley Prot. Union (1885) 25 W. Va. 622, 646; Supreme Lodge *v.* Wollschlager (1896) 22 Colo. 213; Dial *v.* Life Assn. (1888) 29 S. C. 560, 580.

Rawls *v.* Ins. Co. (1863) 27 N. Y. 282, has always been treated as a leading case among those just cited. In form the policy was like those involved in the above cases. That is to say, the insured procured a policy upon his life in favor of the beneficiary B. It should be observed, however, that the court declared the transaction in substance an insurance by B of A's life and considered the non-admissibility of the declarations on that footing.

So far as Aveson *v.* Kinnaird (1805) 6 East 188, and Kelsey *v.* Universal Ins. Co. (1868) 35 Conn. 225, appear to be *contra* they have been discountenanced: See especially Washington Life Ins. Co. *v.* Haney (1872) 10 Kan. 525, at 535, and Mulliner *v.* Guardian Mutual Life Ins. Co. (1873) 1 Thompson & C. (N. Y.) 448, 450.

[1] 2 Wigmore on Evidence, §1082. Tyler *v.* Mather (1857) 9 Gray (Mass.) 177, 184; Noyes *v.* Morrill, (1871) 108 Mass. 396, 399; Stockwell *v.* Blamey (1880) 129 Mass. 312; Bullis *v.* Montgomery (1872) 50 N. Y. 352, 358; Hutchins *v.* Hutchins (1885) 98 N. Y 56, 64. See also Gage *v.* Eddy (1899) 179 Ill. 492, 498.

[2] In stating that "the distinction sometimes taken between statements made before and statements after the policy's execution does not seem to be a sound one," Professor Wigmore (2 Evidence §1081) seems for the moment to have overlooked this application of the principle here invoked.

these cases the insured took out a policy on his own life, payable to himself, and then assigned the policy to the plaintiff. Here, therefore, there was absolutely no doubt about the plaintiff's taking under or from the insured. The declarations made prior to the issuance of the policy by the insured were in both cases held not receivable as admissions. This holding, therefore, rests squarely upon the proposition that the title in regard to which the declarations are made was the obligation of the insurance company, contained in the policy and that the declarations were not receivable because they were made prior to the time that that title accrued to the insured. In the Edington case, at page 193, the court seems specifically to put its decision on that ground.

Declarations made either *before* or *after* the policy and application are receivable or not as admissions according as there is found to be identity of interest between the insured and the beneficiary or not. Such identity of interset exists only provided the beneficiary be regarded as taking under the insured an obligation of the insurance company which the insured has previously himself owned. You must, in short, find that the insured has obtained title to the insurance for himself and then in substance assigned it to the beneficiary.

It is impossible to perceive how this can be made out when the beneficiary takes what is known as a *vested* interest—that is, where there is no right to change the beneficiary or where the beneficial interest is not subject to any condition precedent to its taking effect in possession. In such a case the beneficiary, it is submitted, is not identified in interest with the insured. The beneficiary obtains no title to anything from or under the insured, nor is the insured the agent of the beneficiary. The beneficiary by the making of the contract obtains a separate and individual right as a third party entitled to sue upon the contract in his own name. That right comes direct from the insurance company and not from the insured. The insured may have purchased and paid for the insurance, but the beneficiary did not obtain it from him. To the beneficiary the insured is a stranger. He may be a charitable stranger, but he is nevertheless in law a stranger:

Washington Life Ins. Co. v. *Haney*, (1872) 10 Kan., 525: The court by Mr. Justice Brewer said (p. 535): "The first and third points present the same question, and may be considered together. That question is this: Can the declarations of a party whose life is insured for the benefit of another, made long after

the application and the contract, be received in evidence against the assured to impeach the truthfulness of the application? The contract is between the assured and the insurer. The parties are the same whether that which is insured is a human life or a building. There is this difference: that the life, being active, can by its conduct affect the contract even so far as to annul it, while the building, being inanimate and passive, has of itself no such power. But, aside from this, the rights and liabilities of the parties to the contract are the same. The party insured is not a party to the record, and therefore the declarations are not admissible on that ground. *She is not a party in interest, as the whole benefit and interest inures to the assured.* She is not his agent and authorized to speak for him. Nor does she come within any other rule by which her declarations can be received against him."

Lazensky v. *Supreme Lodge*, (1887) 31 Fed., 592 (Circuit Court, S. D., New York): Here the declarations held not receivable were made prior to the issuance of the policy. The reasoning of the court on identity of interest is equally applicable where the declarations are made subsequent to the issuance of the policy. The court, by Mr. Justice Wheeler, said (p. 595): "It is, however, urged that his application for reinstatement was an admission of suspension, making such an application necessary to bring him into good standing again. This would seem to be such an admission on his part, and raises the question whether such an admission by him is admissible to prove a fact against the plaintiff in this suit. He is no party here; neither is any personal representative of him. She sues in her own right, on a cause of action that accrued, if at all, to her, and to her only. She has acquired the right in consequence of what he did in becoming a member of that lodge, but *not through or from him*, for he never had it. Neither was that act of his a part of any transaction by which her right is sought to be established that might defeat it, or which would of itself prevent it. The act was a mere admission of a past fact, as if he had said merely that he had been suspended, and was not in regular standing. Such an admission would doubtless be evidence against him or his personal representative, or a person claiming a right derived from him; but not against a person claiming only the benefit of his prior acts. 1 Greenl. Ev. §171; *Dodge* v. *Freedman's Co.*, (1876) 93 U. S., 379."

Fraternal Mutual Life Ins. Co. v. *Applegate*, (1857) 7 Oh. St., 292, 297; *Union Central Life Ins. Co.* v. *Cheever*, (1880)

36 Oh. St., 201, 208; *Valley Mutual Life Assn.* v. *Teewalt* (1884) 79 Va., 421, 423: In all of these cases the declarations were made prior to the issuance of the policy. In all of them, however, the court said, following the original language of the Applegate case, that the declarations of the insured in question "are the declarations of a stranger, one who is neither a party to the suit, nor was, at the time of making them, acting as the agent of a party."[1]

Suppose now, however, the beneficiary has what is called a *contingent* as distinguished from a vested interest.

Suppose in the first place the insured had a full right to change the beneficiary at any time. It is difficult to perceive how on principle the beneficiary is any more identified in interest in this case than where the beneficiary took a vested interest. The situation of the beneficiary is exactly the same as it was before, except that by the power to change the beneficiary the named beneficiary's rights are subject to a condition subsequent. There is no more identity of interest between the insured and the beneficiary than exists in the absence of such power in the insured. The charitable stranger simply has power to cease his charity or to drop it as to one and direct it in favor of another. The direct legal rights are at all times between the insurance company and the beneficiary. They may cease by the insured's act, but they do not come from him, but direct from the insurance company.

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[1] Valley Mutual Life Ins. Co. *v.* Burke, 12 Ins. Law Journal, 337 at 342 (Va. Supreme Court of Appeals). The court adopted the same language.

See also the language of the following cases to the same effect:

Sutcliffe *v.* Traveling Men's Assn. (1903) 119 Ia., 220: Here the declarations of the insured were made subsequent to the issuance of the policy. The court, by Mr. Justice Ladd, said (p. 223): "This evidence was objected to, first, because of the incompetency of declarations of deceased against the beneficiary. The latter claims in her own right, and not as representative of or through the assured. * * * This being true, the beneficiary is not bound by admissions of the assured, unless a part of the *res gestæ*."

Schwarzbach *v.* Ohio Valley Prot. Union (1885) 25 W. Va., 622 at 648: Here the declarations held not receivable were made subsequent to the issuance of the policy. The court, by Mr. Justice Green, said: "These declarations were all mere hearsay and can not be used as against the plaintiffs. The insured, who made them, had no interest in the policy most if not all of these declarations having been made long before the policy was issued. Even if made afterward, they were equally mere hearsay; he never did have any interest in the policy."

Rawls *v.* American Mutual Life Ins. Co. (1863) 27 N. Y., 282: Here the declarations held not receivable were made subsequent to the issuance of the policy. The court, by Mr. Justice Wright, said (p. 290): "Fish (the insured) was not, after the issuing to the plaintiff of the policy in suit, a party in interest in that contract, and could make no statement or admission that would divest the rights of the plaintiff. He was not, in any manner, the agent of the plaintiff, after the issuing of the policy, and so could not bind him."

Supreme Lodge v. *Schmidt*, (1884) 98 Ind., 374, 380: Here the beneficiary was subject to change by the insured. The declarations held not receivable were made subsequent to the issuance of the policy. The court, by Mr. Justice Niblack, said: "From the time of the issuance of the certificate until Schmidt's [the insured's] death, Mrs. Schmidt and her co-appellees (she legal and they equitable) were, in legal contemplation, the owners of it, subject only to the right of Schmidt to ultimately substitute other beneficiaries by will, or in such other manner as the rules and regulations of the order might permit. But this right to ultimately substitute other beneficiaries did not empower Schmidt to destroy the value of the certificate in the hands of the appellees by merely hearsay or irrelevant admissions concerning matters in issue between other parties. Schmidt having never exercised the right of substitution reserved to him, we are justified in assuming that he never intended to exercise it, and that, as between the appellees and the order, the former have been the absolute owners of the certificate ever since it was issued. We are, consequently, unable to hold that the alleged admissions of Schmidt to Hanson, in the presence of Stumph, were any more admissible as evidence in the case in hearing than they would have been in an action upon a life insurance policy issued in the usual form."

Rawson v. *Milwaukee Mutual Life Ins. Co.*, (1902) 115 Wis. 641, 647: Here the insured had full power to change the beneficiary. The declarations which were held not receivable were made *prior* to the issuance of the policy. The reasoning of the court, however, on the question of identity of interest was equally applicable to the cases where the declarations were made after the issuance of the policy. The court, by Mr. Justice Winslow, said: "But whatever terms may be applied to the interests of the parties, it must be admitted that for years a contract has been in existence, to which the order and the member have been active parties, and by which during all this time the order has stood pledged to pay to the beneficiary a certain sum of money upon the death of the member without having changed the beneficiary. Certainly, there has been a beneficiary known and ascertained during the whole time. She did not come into existence as a beneficiary at the moment of the death of the assured. She was such from the issuance of the policy. Her interest or right, or whatever it may be termed, was subject to defeat at any moment during the life of the member by his act without her con-

sent. It did not become absolute and indefeasible until the death of the member without having exercised anew his power of appointment. But the fact that the right was subject to the possibility of defeat does not prevent it from being in law a vested right. It is familiar law that interests in land and personal property may be subject to defeat by the happening of a condition subsequent, and yet the interest may be truly vested until the happening of the condition."

Suppose now, the beneficiary's interest was contingent because subject to a condition precedent—as where the policy runs in favor of the insured provided he lives to a certain date, but if not then to B. It is believed that here B does not take under or from the insured so as to be identified in interest with the insured. If the event happens the legal obligation of the insurance company simply ceases as to the insured and arises in favor of B. The situation is strictly analogous to the case where a power of appointment over real or personal property is exercised. The insurance company is the donor of the power, the insured is the donee, and B is the appointee. The insured's interest is vested but subject to be divested. The interest of B is subject to a condition precedent, but when he takes it he does so—as where powers of appointment are exercised[1]—not as the passing of the title from the donee of the power to the appointee, but as the acquisition of the title direct from the donor of the power.[2]

Evers v. *Life Assn. of America*, (1875) 59 Mo. 429: Here the policy was payable to the insured in 1917, if he lived until then, but in the evnet of his dying prior to that time then to the plaintiff as trustee. It does not clearly appear whether the declarations held not receivable were made before or after the issuance of the policy. The reasoning, however, is clearly applicable to the latter case. The court, by Mr. Justice Wagner, said (p. 432): "Whilst he [the insured] lived, he had the sole and

[1] See Christy *v.* Pulliam (1855) 17 Ill. 59, where Roach *v.* Wadham (1805) 6 East 289 (5 Gray's Cases on Property, 338) is cited with approval. In Pulliam *v.* Christy (1857) 19 Ill. 331, 332, the court said: "Nor was it ever doubted in this case, that Christy, as the appointee under the power, derives his title, not under the person executing the power, but under the will." Observe also Henderson *v.* Blackburn (1882) 104 Ill. 227.

[2] The problem is precisely the same if where the insured has the power to change the beneficiary he makes declarations against his interest after the policy issues and subsequently changes the beneficial interest from himself to B. B in that case takes by way of appointment under the insurance company and not from the insured, and there is no identity of interest between the insured and the new beneficiary.

absolute interest, with the bare contingency resulting to the other parties. Had he survived to the designated time, when the payment of the policies were to inure to him personally, it is palpable that he, and he alone, would have reaped their fruits, and there could have been no pretence that any one was jointly interested with him. The interest of the plaintiffs legally did not take effect till Clarke's interest ceased by death, and therefore there could have been no joint interest.[1] Hence it follows that Clark's admissions were not receivable in evidence against the parties to this suit."

As admissions, then, the declarations of the insured are excluded, in a suit by the beneficiary by the application of two principles: If the declarations were made before the policy issued they are excluded because made before the insured's title arose. If the declarations were made either before or after the policy issued they are not receivable because the beneficiary does not take under or from the insured.

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[1] It is believed that the court here by the term "joint interest" really meant "identity of interest."